

Volume 21 | Issue 2

Fall 2018

Defamation and the First Amendment: Protecting Free Speech While Promoting Accountability Under Trump

JP Perry
jperry@nyclu.org

Follow this and additional works at: <https://academicworks.cuny.edu/clr>



Part of the [Law Commons](#)

Recommended Citation

JP Perry, *Defamation and the First Amendment: Protecting Free Speech While Promoting Accountability Under Trump*, 21 CUNY L. Rev. 259 (2018).

Available at: <https://academicworks.cuny.edu/clr/vol21/iss2/6>

Defamation and the First Amendment: Protecting Free Speech While Promoting Accountability Under Trump

Acknowledgements

The author wishes to thank Professor Ruthann Robson for her support, guidance, and feedback. The author would also like to thank the staff of the CUNY Law Review for their feedback during the publication process.

DEFAMATION AND THE FIRST AMENDMENT: PROTECTING FREE SPEECH WHILE PROMOTING ACCOUNTABILITY UNDER TRUMP

JP Perry[†]

INTRODUCTION.....	259
I. BACKGROUND	264
A. <i>Constitutional Limitations on Defamation Law in the United States</i>	265
1. <i>New York Times Company v. Sullivan: Articulating the Public Figure “Actual Malice” Standard</i>	265
2. <i>Gertz v. Robert Welch, Inc.: Defining the General Purpose and Limited Purpose Public Figure</i>	268
3. <i>Common Law Defamation Today: Libel and Slander in New York</i>	270
II. ENGLISH DEFAMATION LAW AS A CASE STUDY	272
A. <i>Trump’s Vision of Loosened Libel Laws in the United States Considered Against the Impact of Censorship and Libel Chill on English Defamation Law</i>	272
B. <i>David Irving v. Penguin Books & Deborah Lipsadt: English Courts as a Site for the Litigation of Truth</i> ..	274
C. <i>Fake News and Alternative Facts: Imagining Loosened Libel Laws Amidst Allegations Against the Press and Alternative Facts</i>	276
III. ZERVOS V. TRUMP	277
CONCLUSION.....	282

INTRODUCTION

The First Amendment and the law of defamation are two doctrines typically in tension with one another. While the common law tort of defamation allows a private citizen to sue another person and recover damages for defamatory statements, the First Amendment limits the ability of public officials to sue for alleged defamatory statements. But the election of Donald Trump presents a unique opportunity for advocates to use both

[†] CUNY School of Law, 2018. The author wishes to thank Professor Ruthann Robson for her support, guidance, and feedback. The author would also like to thank the staff of the CUNY Law Review for their feedback during the publication process.

doctrines to promote legal protections for the press and private citizens alike.

Since his election and during his presidency, Trump has launched numerous attacks that target the heart of the First Amendment and the anti-establishment principles it represents. He issued calls to loosen libel law restrictions when the press published negative pieces against the president.¹ He bolstered his call to weaken First Amendment protections against libel suits by coining the term “fake news”—a delegitimization of mainstream reporting with which the White House disagrees—and “alternative facts”—a counter-legitimization of the White House’s preferred version of a story.² He restricted press access to the White House by excluding particular news agencies from certain press briefings, which raises concerns regarding viewpoint discrimination.³

Yet, despite Trump’s call to expand United States libel laws to make it easier for public officials, like him, to bring defamation suits against press entities and private citizens who speak or publish against the presidency or U.S. government, he continues to rely on and benefit from First Amendment protections as a defendant in a number of lawsuits. Summer

¹ For a sample of lawsuits brought by Trump, see Mark Joseph Stern, *American Bar Association Produces Report Calling Trump a Libel Bully, Censors It Because He’s A Libel Bully*, SLATE: THE SLATEST (Oct. 25, 2016, 1:05 PM), <https://perma.cc/MX2M-6NJR>.

² Compare Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), <https://perma.cc/GPT7-FXGZ> (Trump falsely accuses media of deliberately underestimating the size of the crowd at the inauguration and calls journalists “among the most dishonest human beings on earth”), and Jon Swaine, *Donald Trump’s Team Defends ‘Alternative Facts’ After Widespread Protests*, GUARDIAN (Jan. 23, 2017, 5:25 AM), <https://perma.cc/6525-SHER> (Trump’s former press secretary, Sean Spicer, claims journalists deliberately falsely reported the size of the crowd of Trump’s inauguration as compared to the size of crowd of protests the following day, despite photographs clearly showing otherwise, and Kellyanne Conway defended his characterization claiming he was only offering alternative facts), with Tim Wallace & Alicia Parlapiano, *Crowd Scientists Say Women’s March in Washington Had 3 Times as Many People as Trump’s Inauguration*, N.Y. TIMES (Jan. 22, 2017), <https://perma.cc/5YHW-5Z8R> (reporting crowd scientists estimates of 160,000 at Trump’s inauguration and 470,000 at the Women’s March the following day).

³ Sabrina Siddiqui, *Trump Press Ban: BBC, CNN and Guardian Denied Access to Briefing*, GUARDIAN (Feb. 25, 2017, 12:49 PM), <https://perma.cc/L9R7-R8TH> (reporting that the White House handpicked several conservative news organizations and allowed them to attend an off-camera Q & A session, but prevented other mainstream outlets from attending); Gabrielle Levy, *Trump Won’t Remove Press From White House, but Says He Will Pick Who Gets In*, U.S. NEWS (Jan. 18, 2017, 10:42 AM), <https://perma.cc/4WT3-ST8M> (reporting that Trump formerly stated he would be moving the press corps out of the White House to a room in the Executive Office next door, and later suggested he would allow the press corps to remain in the Brady room, but that some of the press would not be allowed in).

Zervos, a former contestant on his television show, *The Apprentice*, accused Trump of sexually assaulting her.⁴ Zervos was greeted by a barrage of tweets from the then presidential candidate calling her a liar and stating that her accusations were “100% fabricated and made up charges” and “totally made up nonsense.”⁵ Zervos subsequently sued Trump for defamation.⁶ On March 20, 2018, Trump lost his motion to dismiss the case, *Zervos v. Trump*, which was based on a defense of Presidential immunity, but also a First Amendment defense.⁷ Using the First Amendment as a defense, Trump attempted to argue that his tweets were “non-actionable rhetoric and hyperbole that is protected by the First Amendment” and were published as part of a “long-standing public debate,” where “the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole,” and what would ordinarily “be considered as statements of fact may well assume the character of statements of opinion.”⁸ The court was not persuaded, reasoning in its denial of Trump’s motion to dismiss that “[n]o one is above the law,” and even the President is not immune from liability for “purely private acts.”⁹

This, however, presents an unexamined contradiction. Trump is willing to call for loosened First Amendment protections for libel laws amidst his allegations that the press spreads “fake news,” on the one hand, but, on the other hand, he simultaneously relies on the First Amendment protections against libel suits when it benefits him—when charged with sexual harassment. This contradiction is concerning when considered against

⁴ See Molly Redden, *Summer Zervos: Former Apprentice Contestant Claims Trump Kissed and Groped Her*, GUARDIAN (Oct. 15, 2016, 5:20 AM), <https://perma.cc/KMZ2-2F2N>.

⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 15, 2016, 3:51 AM), <https://perma.cc/EGX9-G6FW>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 15, 2016, 11:29 AM), <https://perma.cc/XH7V-NHFY>.

⁶ *Zervos v. Trump*, 59 Misc. 3d 790, 794 (N.Y. Sup. Ct. Mar. 20, 2018).

⁷ *Zervos*, 59 Misc. 3d at 799-800 (denying both motion to dismiss and stay of litigation). As of June 2018, Trump appealed the trial court decision to the Appellate Division, First Department, on the grounds of presidential immunity, but the case proceeds in trial court. See Notice of Appeal, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. Apr. 1, 2018). Trump filed an answer where he denied most of the allegations against him and the court ordered a discovery schedule. See Answer at 1-8, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. May 22, 2018); Preliminary Conference Order, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. June 5, 2018).

⁸ Memorandum of Law in Support of President Donald J. Trump’s Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. P. § 425.16(B)(1) or, in the Alternative, for a Stay Pursuant to CPLR 2201 at 23-25, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. July 7, 2017) (quoting *Rudnick v. McMillan*, 31 Cal. Rptr. 2d 193, 197-98 (Cal. Ct. App. 1994)).

⁹ *Zervos*, 59 Misc. 3d at 795; see also Ruthann Robson, *New York Judge: Trump Not Immune from Defamation Suit by Summer Zervos*, L. PROFESSOR BLOGS NETWORK: CONST. L. PROF BLOG (Mar. 20, 2018), <https://perma.cc/PQ38-YUHP>.

the backdrop of the nationalistic populism that fueled Trump's election and that is ultimately embodied in what has come to be called Trumpism. Trumpism is an individualistic, isolated, nationalistic and American populism that the Alt-Right has cultivated for years through the promotion of a propaganda-filled vision of the United States.¹⁰ This vision seeks to protect white male supremacy through the othering of immigrants and non-citizens, Muslims, people of color, generally, Black Lives Matter, specifically, Transgender and Queer communities, people with disabilities, and women, to name a few.¹¹

Before Trump's election, and certainly after, many speculated that Trumpism presented a threat to the Democratic and egalitarian components of the U.S. government.¹² But the "political use of fear to justify repression" is not new,¹³ it is as much a part of our nation's history as are its Democratic and egalitarian ideals. And neither the manipulation of facts, nor the othering of certain groups for political gain, are new phenomena. "It is a seeming characteristic of American society that it is periodically gripped by fear—fear manipulated by politicians,"¹⁴ like Donald Trump.

The Alien and Sedition Acts of 1798, for example, were some of the U.S. government's first official anti-immigrant legislation. The Sedition Act of 1798 ("Sedition Act") made it a federal crime to write or publish

¹⁰ See *Alt-Right*, SOUTHERN POVERTY L. CENT., <https://perma.cc/6GUD-GERK> ("The Alternative Right, commonly known as the Alt-Right, is a set of far-right ideologies, groups and individuals whose core belief is that 'white identity' is under attack by multicultural forces using 'political correctness' and 'social justice' to undermine white people and 'their' civilization. The Alternative Right is characterized by heavy use of social media and online memes. Alt-Righters eschew 'establishment' conservatism, skew young, and embrace white ethno-nationalism as a fundamental value.").

¹¹ See *id.*; see also Brian Resnick, *Psychologists Surveyed Hundreds of Alt-Right Supporters. The Results Are Unsettling.*, VOX (Aug. 15, 2017, 1:00 PM), <https://perma.cc/WHF5-VWCC>.

¹² See John Cassidy, *An Impulsive Authoritarian Populist in the White House*, NEW YORKER (Jan. 20, 2017), <https://perma.cc/QKR7-DNQS> (Trump as populist authoritarian); David Frum, *How to Build an Autocracy*, ATLANTIC (Mar. 2017), <https://perma.cc/PYG5-MQSL> (Trump as Autocrat); John Nichols, *Donald Trump Just Summed Up His Totalitarian Vision for America in 4 Words*, NATION (Oct. 10, 2016), <https://perma.cc/F3JG-QM7S> (Trump's vision as totalitarian); "Trump's Only Ideology Is 'Me', Deeply Authoritarian & Very Dangerous" - Noam Chomsky, RT (May 11, 2017, 1:04 PM), <https://perma.cc/S2P3-YCTM> (Trump's ideology as deeply authoritarian); Zócalo Public Square, *What History Teaches Us About Demagogues Like the Donald*, TIME (June 20, 2016), <https://perma.cc/XJ4G-EYSW> (Trump as populist demagogue); Zoe Williams, *Totalitarianism in the Age of Trump: Lessons from Hannah Arendt*, GUARDIAN (Feb. 1, 2017, 1:27 PM), <https://perma.cc/PZ2D-CB6C> (Trump's enterprise as totalitarian).

¹³ ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 21 (2007).

¹⁴ *Id.* at 103.

anything libelous against the President, Congress, or the U.S. government, in general, or else face a fine and imprisonment.¹⁵ People often look to the courts for protection, but in the case of the Sedition Act, the “[c]ourts did nothing to restrain [their] harsh consequences” and instead allowed the Senate to make seditious libel a federal crime.¹⁶ When the First Amendment was later adopted, it was not done so to explicitly eliminate seditious libel as a federal crime, but some speculate that, by that time, the “weight of American opinion was that such a crime was inconsistent with constitutional values.”¹⁷

Since its passage and subsequent doctrinal evolution, the First Amendment has come to embody anti-authoritarianism. Seeking protection under the First Amendment, people turn to the courts for assurance “that they can believe what they will and say what they believe,”¹⁸ and that it will be protected. Just as the U.S. government used the possibility of foreign threats as justification to deprive American citizens and non-citizens’ civil liberties during the time of the Sedition Act, so too has Trump’s rhetoric been used to justify policy-based deprivations of civil liberties for Muslims, immigrants and non-citizens, people of color, members of Transgender and Queer communities, people with disabilities, and women. While the First Amendment and defamation are often viewed in tension with one another, advocates have the opportunity to use both doctrines as tools in the resistance against Trumpism.

Part I overviews the U.S. common law of defamation, as well as the First Amendment constitutional limitations to defamation. This section uses New York defamation law both to offer an example of how defamation is analyzed by modern courts and as background for understanding how the court should analyze the defamation claim in *Zervos v. Trump*.

Parts II and III present the argument that the use of both the First Amendment as a defense against libel suits brought by the government or public figures, as well as defamation torts brought against public officials, are opportunities to promote the press and private citizens’ speech rights. Part II offers a comparison between defamation law in the United Kingdom and the United States. This section provides a brief case-study of *Irving v. Lipstadt* and presents the problem of press censorship, or “libel chill,” when courts are tasked with the litigation of truth in public discourse. Part III then provides an overview of *Zervos v. Trump* and an analysis of how the case should ultimately be decided.

¹⁵ Sedition Act, ch. 74 1 Stat. 596 (1798) (expired 1801); Alien Act, ch. 58, 1 Stat. 570 (1798) (expired 1801). The Alien Act also gave the president authority to deport non-citizens considered “dangerous to the peace and safety of the United States” Alien Act, § 1.

¹⁶ LEWIS, *supra* note 13, at 106.

¹⁷ *Id.* at 21.

¹⁸ *Id.* at 106.

This note concludes first with a consideration of possible defamation suits against Trump for his allegations that mainstream news organizations report “fake news.” It then recommends that advocates use defamation, and First Amendment protections against defamation, as tools in the resistance against Trumpism and to protect the individuals and groups whose civil liberties Trump attempts to deprive.

I. BACKGROUND

In the United States, defamation exists as a cause of action and mechanism for recovery of damages at common law.¹⁹ Under the common law, defamation is “a statement that injures a third party’s reputation.”²⁰ Defamation encompasses the twin torts of slander, in the case of oral communication, and libel, where there is written communication.²¹ However, slander and libel are typically treated as two separate torts.²²

The United States inherited defamation from English common law, yet methods of punishment and recovery for damaging another’s reputation have their roots in the Middle Ages. In the 9th Century, for example, “the remedy for defamation was to cut out the offender’s tongue.”²³ Later in the Middle Ages, slander was “handled by manorial courts where the slanderer was required to vindicate the defamed party in front of those who heard the slanderous remarks,” and later fell “within the jurisdiction of ecclesiastical courts—which viewed defamation as a sin punishable by penance.”²⁴ Actions for slander appear in common law courts in England as early as the 16th Century, and by the 17th Century, “the concept of libel also emerged in common law courts as a way of suppressing and criminally punishing printed political attacks.”²⁵

Libel and slander are still commonly recognized and discussed as separate causes of action. “Libel was established as a greater wrong . . .

¹⁹ 1 RODNEY A. SMOLIA, LAW OF DEFAMATION § 1:1, Westlaw (database updated May 2018).

²⁰ *Defamation*, LEGAL INFO. INST., <https://perma.cc/XBD7-45UM>.

²¹ 1 SMOLIA, *supra* note 19, § 1:2; *see also* Bierman v. Weier, 826 N.W.2d 436, 444 (Iowa 2013) (“Defamation includes the twin torts of libel and slander. Libel involves written statements, while slander involves oral statements.” (quoting Kiesau v. Bantz, 686 N.W.2d 164, 174 (Iowa 2004))).

²² The terms defamation, libel, and slander, although legally distinct concepts, are commonly used interchangeably, with the term libel used most often. Where legally relevant, I distinguish the terms, but otherwise use the terms defamation and libel interchangeably.

²³ 1 SMOLIA, *supra* note 19, § 1:2 (citing Collin Rhys Lovell, *The “Reception” of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962) (citation omitted)).

²⁴ Smith v. Durden, 276 P.3d 943, 945 (N.M. 2012) (citing William L. Prosser, *Handbook of the Law of Torts* 737 (4th ed. 1971)).

²⁵ *Id.* (citing Prosser, *supra* note 24, at 738).

perceived as more deliberate and more malicious, more capable of circulation in distant places.”²⁶ Eventually, this distinction led not only to two separate causes of action, but to the development of “defamation as actionable *per se* or *per quod*.”²⁷ Defamation *per se* refers to a tort of defamation that can be established “without proof of harm.”²⁸ Whereas, defamation *per quod* “is not defamatory on its face,” and so requires “extrinsic facts” “to prove its defamatory nature before recovery is allowed.”²⁹

A. *Constitutional Limitations on Defamation Law in the United States*

Under federal constitutional law, defamation is limited by First Amendment doctrine.³⁰ Any present-day defamation suit is limited and influenced by these constitutional principles, even though common law defamation, including the torts of libel and slander, predates the First Amendment.

1. *New York Times Company v. Sullivan*: Articulating the Public Figure “Actual Malice” Standard

Defamation is in doctrinal tension with First Amendment speech and press freedoms.³¹ Defamation posits that private citizens and public officials ought to be able to recover from another person or a news organization for reputational damage and actual harm, whether physical, economic, or emotional, caused by the other entity’s spoken or written speech. This is, however, at odds with the primary function of free speech under the First Amendment, which is to promote the free exchange of ideas where the speaker can say and think what they want, no matter how unpopular or offensive, without fear of governmental reprimand and control.³²

²⁶ *Id.* (quotation omitted).

²⁷ *Id.* (emphasis added).

²⁸ *Id.* (citation omitted).

²⁹ *Id.* (citation omitted).

³⁰ 1 SMOLIA, *supra* note 19, § 1:1; *see also* Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

³¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (“Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, ‘some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.’” (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 152 (1967))).

³² FLOYD ABRAMS, *FRIEND OF THE COURT: ON THE FRONT LINES WITH THE FIRST AMENDMENT* 5 (2013) (“[T]he central concern of the First Amendment is the danger of government control over what is thought and what is said. It is not just that the First Amendment,

In its landmark case, *New York Times v. Sullivan* (“*New York Times*”), the U.S. Supreme Court addressed for the first time the constitutionality of common law defamation. In *New York Times*, L.B. Sullivan, a public figure, brought a libel action against the *New York Times*.³³ Sullivan’s libel claim conflicted with the *New York Times*’ First Amendment speech and press protections.³⁴ In *New York Times*, the Court held that a public official, public figure, or person running for public office can recover damages for defamation only by proving with clear and convincing evidence the falsity of defamatory statements and the presence of actual malice in the speaker.³⁵ Actual malice includes either intent or knowledge that the statement was false or amounts to a reckless disregard of the truth.³⁶ Practically speaking, when a public figure alleges that a private citizen, news organization, or any publishing entity publishes a statement (libel) or says a statement (slander), the public figure may only sue that entity if the entity acted with actual malice. This rule highlighted the First Amendment’s promotion and protection of the free and unencumbered exchange of ideas: a defamation action, or even the *threat* of a defamation action, by any public official, particularly against a newspaper or press entity, limits the press entity’s willingness to freely exchange controversial ideas. The actual malice standard created a higher burden for defamation actions brought by public officials, and in turn, the limitation promotes the First Amendment’s protection of the free exchange of ideas.

The Court decided *New York Times* in the height of the Civil Rights Movement. In the early 1960s, L.B. Sullivan, who supervised the local police department as an elected Commissioner of the City of Montgomery, Alabama, brought a libel action against the *New York Times*, as well as four Black clergymen in Montgomery. Sullivan alleged that he had been libeled by an advertisement printed in the newspaper regarding the non-violent student organizing movement taking place in the Deep

like the rest of the Bill of Rights, applies only to acts of the government. It is that it is, at its core, a protection against government. That, surely, is what Jefferson had in mind when he wrote that a bill of rights was ‘what the people are entitled to against every government on earth.’ It is what Justice William O. Douglas meant when he observed that ‘[t]he struggle for liberty has been a struggle against government.’ And it is what Justice Robert Jackson, in a typically felicitous phrase, conveyed in stating that ‘[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.’”) (alterations in original).

³³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

³⁴ *Id.*

³⁵ *Id.* at 284-86.

³⁶ *Id.* at 280.

South.³⁷ The advertisement mentioned the Montgomery Police and contained a variety of undisputed inaccuracies within its text.³⁸ Sullivan asked the New York Times to retract the advertisement, claiming that it amounted to a libelous statement against him, pursuant to the Alabama law that “denies a public officer,” like Sullivan, “recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply.”³⁹

When the New York Times did not publish a retraction, Sullivan sued in an Alabama court a few days later. The case went before a jury, and the judge instructed the jury that the statements in the advertisement were “libelous per se,” because “the law . . . implies legal injury from the bare fact of publication itself, falsity and malice are presumed, general damages need not be alleged or proved, but are presumed, and punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.”⁴⁰ The jury found for Sullivan.⁴¹ Before giving the jury instruction, the trial judge refused to consider the New York Times’ argument that the judge’s instructions violated freedom of speech and the press as protected by the First and Fourteenth Amendment.⁴² The Supreme Court of Alabama affirmed the judgment in its entirety.⁴³

The Supreme Court, however, reversed, stating that “the rule of law applied by the Alabama courts [was] constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.”⁴⁴ First, the Court explained that the state action threshold required for any claim brought under the First and Fourteenth Amendment is satisfied in an action for defamation,⁴⁵ although defamation suits are technically civil lawsuits between two private entities, one party brings the action for recovery

³⁷ *Id.* at 256-57.

³⁸ *Id.* at 258-59.

³⁹ *N.Y. Times Co.*, 376 U.S. at 261.

⁴⁰ *Id.* at 262 (quotation marks omitted).

⁴¹ *Id.* at 262-63.

⁴² *Id.* at 263.

⁴³ *Id.*

⁴⁴ *Id.* at 264.

⁴⁵ State action is the threshold requirement for all constitutional claims, with the exception of those brought under the Thirteenth Amendment, which prohibits slavery. The Civil Rights Cases, 109 U.S. 3 (1883).

against another relying on state defamation laws, so state action is established for any challenge to the constitutionality of the application of a defamation law under the First and Fourteenth Amendments.⁴⁶

Next, the Court considered “the case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,” and so concluded that the First Amendment protects certain speech made against public officials.⁴⁷ The Court explained, “[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.”⁴⁸ There is a historical risk, the Court reasoned, in placing limitations on any form of dissenting statement citizens and the press can bring against public officials, even if those statements are factually inaccurate, and “constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴⁹ Thus, the Court held that “the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”⁵⁰

2. *Gertz v. Robert Welch, Inc.*: Defining the General Purpose and Limited Purpose Public Figure

A decade later, the Supreme Court in *Gertz v. Robert Welch, Inc.* (“*Gertz*”) clarified the meaning of public figure for the purpose of the *New York Times* actual malice standard. In *Gertz*, the Court held that states can define the appropriate standard for liability under defamation for a publisher or broadcaster that produces a defamatory false statement that injures a private individual.⁵¹ But, the Court also clarified that while a heightened actual malice standard is required when a defamatory statement is made against a public figure, it broadened the definition of public

⁴⁶ *N.Y. Times Co.*, 376 U.S. at 265.

⁴⁷ *Id.* at 270 (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)).

⁴⁸ *Id.* at 271 (quoting *NAACP v. Button*, 371 U.S. 415 (1963)).

⁴⁹ *Id.* at 280.

⁵⁰ *Id.* at 283-90.

⁵¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974).

figure: (1) those who achieve pervasive fame and notoriety for all purposes (“general purpose public figures”), and (2) those who voluntarily enter or are drawn into a particular public controversy and act as a public figure for a limited range of issues (“limited purpose public figures”).⁵² In the words of the Court, a general purpose public figure is someone who has “achieve[d] such pervasive fame or notoriety” or “such pervasive power and influence” that that person “becomes a public figure for all purposes and in all contexts.”⁵³ A limited purpose public figure, in contrast, is “an individual [who] voluntarily injects” or thrusts himself, or is involuntarily “drawn into a particular public controversy” “in order to influence the resolution of the issues involved” and “thereby becomes a public figure for a limited range of issues.”⁵⁴

The petitioner in *Gertz* was an attorney in a civil action for the family of a young man who was shot and killed by a Chicago police officer.⁵⁵ The respondent published a monthly publication titled “American Opinion,” which contained the views of the John Birch Society. The John Birch Society was, at the time, attempting to “warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship.”⁵⁶ The magazine published a story that contained serious inaccuracies, claiming without a basis that Gertz had a criminal record, was a “Leninist” and a “Communist-frontier,” and had “been an officer in the National Lawyers Guild,” which the magazine misidentified as a communist organization and inaccurately alleged that it planned an attack on the Chicago police.⁵⁷ After Gertz sued for defamation, the respondent-magazine claimed First Amendment privilege, arguing that Gertz was a public figure, so could not succeed under the heightened actual malice standard.⁵⁸ The Court disagreed with the respondent, and eventually concluded that Gertz was not a public figure because he had not “thrust himself into the vortex of [a] public issue, nor did he engage the public’s attention in an attempt to influence its outcome.”⁵⁹

The Court used this case to clarify the meaning of public figure, and held that parties who are not public figures for all purposes may still be public figures with respect to a particular controversy.⁶⁰ When the Court

⁵² *Id.* at 345.

⁵³ *Id.*

⁵⁴ *Id.* at 345, 351.

⁵⁵ *Id.* at 325.

⁵⁶ *Id.*

⁵⁷ *Gertz*, 418 U.S. at 325-26.

⁵⁸ *Id.* at 327-28.

⁵⁹ *Id.* at 351.

⁶⁰ *Id.* at 352.

broadened the public figure category in *Gertz*, it also broadened First Amendment protections for the press against defamation suits because, after *Gertz*, either general or limited purpose public figures must meet the heightened actual malice standard.

3. Common Law Defamation Today: Libel and Slander in New York

Common law defamation, encompassing the twin torts of libel and slander, varies jurisdiction by jurisdiction. New York defamation law offers one example of how modern courts analyze an action for libel or slander and provides a background for how the court in *Zervos v. Trump*, discussed below, should analyze Summer Zervos's defamation suit against Trump.

In New York, the torts of libel and slander are categorized as personal injuries.⁶¹ The courts of New York apply two different standards, in line with the constitutional limitations outlined in *New York Times* and *Gertz*, to evaluate a claim for a defamatory statement, either through libel (written communication) or slander (oral communication). There is one standard for a plaintiff who is a private citizen and another for a plaintiff who is a public figure.

If a plaintiff is a private citizen, it is the plaintiff's burden to prove five elements to succeed on a libel or slander claim:

- (1) A written (libel) or spoken (slander) defamatory statement about the plaintiff;
- (2) Unauthorized publication to a third party;
- (3) Fault (negligence at a minimum for private citizens, compared with actual malice for public figures);
- (4) Falsity of the defamatory statement; and
- (5) Special harm to the plaintiff's reputation or defamation *per se*.⁶²

⁶¹ N.Y. GEN. CONSTR. LAW § 37-a (McKinney 2018) (“‘Personal injury’ includes libel, slander and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.”).

⁶² *Mitre Sports Int'l. Ltd. v. Home Box Office, Inc.*, 22 F. Supp. 3d 240, 252 (S.D.N.Y. 2014) (citing *Celle v. Filipino Reporter Enters, Inc.*, 209 F.3d 163, 176 (2d Cir. 2000)); *see also* *Accadia Site Contracting, Inc. v. Skurka*, 129 A.D.3d 1453, 1453 (4th Dep't 2015) (quoting *D'Amico v. Corr. Med. Care, Inc.*, 120 A.D.3d 956 (4th Dep't 2014)); CHRISTINE M. G. DAVIS ET AL., 43A N.Y. JUR. 2D *Defamation & Privacy* § 6, Westlaw (database updated May 2018).

“When statements fall within established categories of *per se* defamation,” however, “the law presumes that damages will result, and they need not be alleged or proven.”⁶³ Moreover, there are four exceptions to the general requirement that a plaintiff establish that they suffered “special harm” to their reputation: (1) statements that charge a plaintiff with a serious crime; (2) statements that injure a person’s trade or business; (3) statements that allege a plaintiff has a “loathsome disease;” and (4) statements “imputing unchastity to a woman.”⁶⁴

If, however, the plaintiff is a public figure, the plaintiff bears the burden of satisfying the heightened “actual malice standard,” which replaces the elements mentioned above for private citizens with the four elements listed below to succeed on a claim for either libel or slander. The public figure plaintiff must show that:

- (1) The alleged statements were about and concerning him;
- (2) That they were likely to be understood as defamatory by the ordinary person;
- (3) That the statements were false; and
- (4) That they were published with actual malice.⁶⁵

While the Supreme Court articulated that a general purpose public figure is someone who has “general fame or notoriety in the community and pervasive involvement in the affairs of society,” and that a limited purpose public figure is someone who has “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved,”⁶⁶ the Second Circuit has also articulated a test for determining when someone is a limited purpose public figure. Typically, a defendant will allege that the plaintiff is a limited purpose public figure to encourage the court to apply the heightened actual malice standard in the defamation suit. To prove that the plaintiff is a limited purpose public figure, the defendant must show the plaintiff has:

- (1) Successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation;

⁶³ Zherka v. Amicone, 634 F.3d 642, 645 (2d Cir. 2011).

⁶⁴ “There are ‘four established exceptions [to the requirement that plaintiff allege special damages] consist[ing] of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.’” *Id.* at 645 n.6 (quoting Liberman v. Gelstein, 80 N.Y.2d 429 (1992)).

⁶⁵ Curry v. Roman, 217 A.D.2d 314, 318 (4th Dep’t 1995).

⁶⁶ Gertz v. Robert Welch, Inc., 418 U.S. 323, 324, 345, 352 (1974).

- (2) Voluntarily injected himself into a public controversy related to the subject of the litigation;
- (3) Assumed a position of prominence in the public controversy; and
- (4) Maintained regular and continuing access to the media.⁶⁷

When determining whether a plaintiff is a limited purpose public figure, courts may also consider other factors, like whether the plaintiff has “taken affirmative steps to attract personal attention or [has] strived to achieve a measure of public acclaim,” and whether or not that personal attention or acclaim is actually achieved.⁶⁸

II. ENGLISH DEFAMATION LAW AS A CASE STUDY

A. *Trump’s Vision of Loosened Libel Laws in the United States Considered Against the Impact of Censorship and Libel Chill on English Defamation Law*

Trump has called repeatedly for loosened libel restrictions. During his campaign, he argued that defamation law in the United States ought to be more like libel law in the United Kingdom where, according to him, “you can actually sue if someone says something wrong.”⁶⁹ Based on interviews and additional statements, it appears that Trump’s current understanding of defamation law in the United Kingdom, and his vision for loosened libel protections in the United States is as follows:

Our press is allowed to say whatever they want and get away with it. And I think we should go to a system where if they do something wrong . . . I’m a big believer, tremendous believer, of the freedom of the press. Nobody believes it stronger than me, but if they make terrible, terrible mistakes and those mistakes are made on purpose to injure people. I’m not just talking about me, I’m talking anybody else then, yes, I think

⁶⁷ *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 617 (2d Cir. 1988).

⁶⁸ *Mitre Sports Int’l. Ltd. v. Home Box Office, Inc.*, 22 F. Supp. 3d 240, 251 (S.D.N.Y. 2014) (citing *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976)).

⁶⁹ David Bixenspan, *Trump Gives Rambling Answer About Press Freedoms in Miami TV Interview*, LAW & CRIME (Oct. 24, 2016, 1:09 PM), <https://perma.cc/QW7B-DJW7> (statement of Donald Trump). Although England, the United Kingdom, Great Britain and Britain are sometimes used interchangeably when discussing defamation law in the United Kingdom, I discuss defamation law as it is applied under the current legal system in the United Kingdom of Great Britain and Northern Ireland (“United Kingdom”), which includes the common law systems of England, Wales, Northern Ireland, and Scotland. See *Legal Research Guide: United Kingdom*, LIBR. OF CONGRESS, <https://perma.cc/9BZY-8MDF>. When I do not use the term United Kingdom, I use the terms England or English common law because the law of defamation derives from the English common law.

you should have the ability to sue them . . . [I]n England, you have a good chance of winning. And deals are made and apologies are made. Over here they don't have to apologize. They can say anything they want about you or me and there doesn't have to be any apology. England has a system where if they are wrong, things happen.⁷⁰

There are a number of primary differences between defamation law in the United States and English defamation. In the United Kingdom, once a plaintiff sues a defendant for libel or slander, the burden is on the defendant to prove that they did not libel or slander the plaintiff. Further, to recover for libel in the United Kingdom, “plaintiffs need only show that the press or media made defamatory statements that referred to them or that reasonable people would regard as referring to the plaintiffs.”⁷¹ While the “media and press do have a privilege of fair comment,” “the scope of this right is severely limited” and “protects only assertions of opinion, and not assertions of fact.”⁷² In contrast, in the United States, the burden is on the plaintiff to either demonstrate harm, or in the case of a public figure plaintiff, actual malice. Under English defamation law then, it is far easier for plaintiffs (who may be public figures) to recover against defendants (who are frequently press entities) than it is in the United States. It is not, however, easy for defendants in the United Kingdom to win. The differing international standards for libel in the United States and United Kingdom have created a legal phenomenon known as “libel tourism” where a plaintiff brings a lawsuit in a country where it is likely to win, like in the United Kingdom.⁷³

One criticism of English libel law is that where the defendant (often a press entity) bears the burden of proof, it exposes the press to near constant and expensive litigation, which has a chilling effect on the substance of what is reported and what is not.⁷⁴ This effect is commonly called “libel chill.”⁷⁵ Libel chill creates a fear of impending litigation, which subsequently limits the public’s “access to information that would properly inform their decision-making on important topics, such as public health and safety, or about the conduct of powerful corporations.”⁷⁶

⁷⁰ Bixenspan, *supra* note 69 (first omission in original) (statement of Donald Trump).

⁷¹ Russell L. Weaver & Geoffrey Bennett, *Is the New York Times “Actual Malice” Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1162 (1993).

⁷² *Id.*

⁷³ Ari Shapiro, *On Libel and the Law, U.S. and U.K. Go Separate Ways*, NPR (Mar. 21, 2015, 7:11 AM), <https://perma.cc/G78U-J7QC>.

⁷⁴ *See id.*

⁷⁵ Allen Green, *Banish the Libel Chill*, GUARDIAN (Oct. 15, 2009, 12:00 PM), <https://perma.cc/YY8H-DRGG>.

⁷⁶ *Id.*

In expressing his desire for U.S. libel laws to be more similar to those in the United Kingdom, Trump is likely hoping for the following: (1) for the burden to be placed on the defendant to prove the truth of their allegedly defamatory statements; (2) for there to be no comparable free speech protection when the plaintiff is a public figure and the defendant is the press, and so the press is exposed to a near constant threat of litigation; (3) for the press to have a “privilege of fair comment” that would only apply to opinions, not facts, meaning that any allegation of “fake news” or “alternative facts” could be used as fodder for a defamation lawsuit; and (4) for state courts to be tasked with evaluating the truth or falsity of a defendant’s allegedly defamatory statements.

The Supreme Court has already expressly spoken to its concern about libel laws that do not prioritize freedom of expression and public discourse. As discussed above, the Court explained in *New York Times*, “[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth.”⁷⁷ There is a historical risk, the Court reasoned, in placing limitations on any forms of dissenting statement citizens and the press can bring against public officials.⁷⁸ The purpose of these First Amendment protections in the United States is to combat against the threat of libel chill, and to promote the free and unencumbered exchange of ideas, no matter how unpopular.

B. David Irving v. Penguin Books & Deborah Lipsadt: English Courts as a Site for the Litigation of Truth

Case law in the United Kingdom offers a glimpse of what it might look like if libel laws were loosened in the United States. When “the burden of proving truth [is] on the speaker,” regardless of the topic and no matter how seemingly historically contested, courts are required to evaluate the truth or falsity of the alleged defamatory statement. This often puts courts on a difficult path of historical interpretation. Courts in England are routinely tasked with this activity and must carefully balance their evaluation of the truth or falsity of a defamatory statement with the truth or falsity of the facts underlying the allegedly defamatory statement. An example of how an English court handles this task is found in *David Irving v. Penguin Books & Deborah Lipsadt* (“*Irving*”).⁷⁹ In *Irving*, the court was required to evaluate whether Deborah Lipsadt’s book, *Denying the Holocaust*, which charted the history of the Holocaust Denial Movement, was defamatory toward Holocaust Denier, David Irving.

⁷⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (citing *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

⁷⁸ *See id.* at 271-73.

⁷⁹ *Irving v. Penguin Books Ltd.*, [2000] EWHC (QB) 1996-I-1113 (Eng.).

Deborah Lipsadt is a Jewish-American historian who is known for authoring the book, *Denying the Holocaust*.⁸⁰ In *Denying the Holocaust*, Lipstadt extensively researched and wrote about the history of the Holocaust Denial Movement, naming David Irving, among others, as a Holocaust denier.⁸¹ Irving produced numerous works that many scholars considered historically revisionist; Irving claimed that the Holocaust did not happen, arguing, for instance, that Hitler did not know of the extermination of the Jews or, if he did, opposed it.⁸² Irving sued Penguin Books, the publisher of *Denying the Holocaust*,⁸³ and Lipstadt for libel over Lipstadt's allegedly defamatory statements calling Irving a Holocaust denier.⁸⁴ The court summarized the issues in the case as follows:

Irving complains that certain passages in the Defendants' book accuse him of being a Nazi apologist and an admirer of Hitler, who has resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place. He contends that the Defendants' book is part of a concerted attempt to ruin his reputation as an historian and he seeks damages accordingly. The Defendants, whilst they do not accept the interpretation which Irving places on the passages complained of, assert that it is true that Irving is discredited as an historian by reason of his denial of the Holocaust and by reason of his persistent distortion of the historical record so as to depict Hitler in a [favorable] light. The Defendants maintain that the claim for damages for libel must in consequence fail.⁸⁵

The court made a special effort to specify that "the context in which these issues fall to be determined is one which arouses the strongest passions," so noted that it was important to "stress at the outset of this judgment that [the court does] not regard it as being any part of [its] function as the trial judge to make findings of fact as to what did and what did not occur during the Nazi regime in Germany."⁸⁶ Even though the court attempts to make clear that it is not analyzing the truth of the facts underlying the case—whether or not the Holocaust happened—in a way, the court

⁸⁰ DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST* (2013).

⁸¹ *See id.*

⁸² Irving authored many books regarding "the events of and leading up to the Second World War" and is a specialist in "the history of the Third Reich." *Irving v. Penguin Books Ltd.*, [2000] EWHC (QB) 1996-I-1113 (Eng.).

⁸³ *Id.*

⁸⁴ *Id.*; see also Dennise Mulvihill, Comment, *Irving v. Penguin: Historians on Trial and the Determination of Truth Under English Libel Law*, 11 *FORDHAM INTELLECTUAL PROP., MEDIA & ENTMT'L J.* 217 (2000).

⁸⁵ *Irving v. Penguin Books Ltd.*, [2000] EWHC (QB) 1996-I-1113, [1.2] (Eng.).

⁸⁶ *Id.* at [1.3].

could not avoid doing this, because the truth or falsity of that fact is determinative of the truth or falsity of the defamatory statement made against the Holocaust Denier, David Irving.

The court investigated the supposedly defamatory statements made in the book and evaluated whether or not the statements had a defamatory meaning. Ultimately, the case proceeded through a long trial, where the court was required to review a substantial body of historical evidence to determine if Lipstadt defamed Irving. The burden of proof was on Lipstadt and Penguin Books to prove the claims were true. The judge eventually ruled that Lipstadt succeeded in proving nearly every claim she asserted except for two claims.⁸⁷ That Lipstadt and Penguin Books won was no small feat, especially considering they had the burden of proving the truth of the statements in *Denying the Holocaust*.⁸⁸ This lawsuit demonstrates the difficult position that courts are put in when they are tasked with evaluating the truth or falsity of a defamatory statement.

C. *Fake News and Alternative Facts: Imagining Loosened Libel Laws Amidst Allegations Against the Press and Alternative Facts*

Irving, in particular, demonstrates the importance of facts and how to effectively “fight for the truth in an era marked by ‘alternative facts.’”⁸⁹ Courts in the United States are not put in as difficult of a position as courts in the United Kingdom when it comes to evaluating the truth or falsity of a statement. This is because the burden is on the plaintiff in the United States to make out the elements of a defamation tort—generally, that a defamatory statement was made or published, that it was false, and that it caused a special harm, or in some cases *per se* defamation. Assuming a plaintiff does make out these elements, the court or jury must still ultimately determine whether to believe the truth of the facts that the plaintiff alleges.

If a court, whether in the United States or United Kingdom, is ultimately tasked with evaluating a defamation claim based on the facts alleged, then what is a court to believe if a public figure categorizes mainstream media reporting as “fake news,” and then claims that an alternative version of the story is supported by “alternative facts”? Trump has

⁸⁷ *Id.*

⁸⁸ Forum shopping is an issue in England, but also libel laws in England may be slowly liberalizing: *Jameel v. Wall St. Journal*, [2005] EWCA (Civ) 74 (Eng.).

⁸⁹ *Deborah Lipstadt: Behind the Lies of Holocaust Denial*, TED (Apr. 2017), <https://perma.cc/QRE8-KJ7P>.

launched repeated attacks against the veracity of mainstream news reporting,⁹⁰ and has also favored Alt-Right or right-leaning news organizations over more mainstream news organizations.⁹¹ This calls into question what facts a court can, or should, rely on when a public figure like Trump spreads a nationalistic rhetoric that consistently accuses reputable news companies of lying, frequently without basis, and then promotes an alternative version of the facts as the truth.

III. ZERVOS V. TRUMP

The court in *Zervos v. Trump* should find that Trump defamed Summer Zervos and can do so within the limits of the First Amendment. In the present case, Trump offers as a defense to defaming Summer Zervos, after she accused him of sexual assault and harassment, an *admission* that making defamatory statements is common practice in public discourse. The court need look no further than Trump's own defamatory statements to find in favor for Zervos.

In January 2017, Summer Zervos, a former contestant on Trump's reality television show, *The Apprentice*, sued Trump in New York state court for defamation.⁹² Zervos previously came forward and accused Trump of kissing and groping her, once at his New York office and then again at a Beverly Hills hotel, where he "placed his hand on her breast," tried to lead her into a hotel room, and after she resisted his advances, "press[ed] his genitals against her" while trying to kiss her.⁹³ Zervos decided to come forward about Trump's sexual misconduct because she felt

⁹⁰ In remarks made at the Conservative Political Action Conference, Trump decried "fake news 'the enemy of the people,'" claiming that the mainstream news organizations CBS, ABC, and NBC conducted polls prior to the election that were either inaccurate or illegitimate. Donald Trump, Remarks at the Conservative Political Action Conference (Feb. 24, 2017), <https://perma.cc/7V76-FHAP>. Trump has also frequently criticized the New York Times, labeling the entire publication "fake news." Rebecca Morin, *Trump Criticizes 'Fake News' New York Times*, POLITICO (Feb. 4, 2017, 9:11 AM), <https://perma.cc/P6MC-T6FL>.

⁹¹ Although he recently left the position, Trump initially hired as his Chief Strategist, Steve Bannon, former executive chair of the Alternative Right (Alt-Right) news company, Breitbart News. Breitbart News has been criticized for lacking support for many of the extreme positions that it publishes on its website. Trump has also limited press access and apparently privileged certain news agencies over others, which lends to the theory that Alt-Right-leaning news organizations may evolve into a privatized version of state-sponsored media. Matthew Ingram, *Why Breitbart News Will Be the Closest Thing to a State-Owned Media Entity*, FORTUNE (Nov. 15, 2016), <https://perma.cc/XJ7H-6YWC>.

⁹² Complaint and Demand for Jury Trial, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017).

⁹³ *Zervos v. Trump*, 59 Misc. 3d 790, 792 (N.Y. Sup. Ct. Mar. 20, 2018); see also Complaint and Demand for Jury Trial, *Zervos v. Trump*, Index No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017); Molly Redden, *Summer Zervos: Former Apprentice Contestant Claims Trump Kissed and Groped Her*, GUARDIAN (Oct. 15, 2016, 5:20 AM), <https://perma.cc/KMZ2-2F2N>.

that it “was ethically the right thing to do” and “so that the public could evaluate Mr. Trump fully as a candidate for president.”⁹⁴

Trump made numerous statements denying her allegations and claiming their falsity on his campaign website, at a campaign rally, at a presidential debate,⁹⁵ and also on the social media platform, Twitter, in which he called her a liar, and said the allegations were “100% fabricated and made-up charges” and “totally made up nonsense.”⁹⁶ At a campaign rally in Pennsylvania, Trump also said: “Every woman lied when they came forward to hurt my campaign, total fabrication. The events never happened. Never. All of these liars will be sued after the election is over.”⁹⁷ Zervos alleged that Trump’s repeated statements about her, including his statement that the description of the sexual assault was a lie, amounted to defamation against her.⁹⁸

Zervos cited to numerous statements made by Trump and reported by the media, in addition to his Twitter feed throughout his campaign. Zervos stated in her complaint that Trump’s “defamatory statements clearly identified Ms. Zervos,” and that they were “defamatory *per se*.”⁹⁹ The statements were “published throughout New York and across the country” in part because Trump “ensured that his statements would be widely disseminated by sending them out over Twitter himself,” and that Trump “made the statements knowing they were false or recklessly disregarding their truth or falsity.”¹⁰⁰ Zervos alleged that she suffered emotional harm and economic damage, “including reduced income and revenue at her restaurant.”¹⁰¹

In July 2017, Trump moved to dismiss the complaint.¹⁰² In his request for dismissal, or at least a stay pursuant to N.Y. C.P.L.R. section 2201 for the duration of his presidency, Trump argued that the court may

⁹⁴ *Zervos*, 59 Misc. 3d at 793.

⁹⁵ *Id.* at 793-94.

⁹⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 15, 2016, 3:51 AM), <https://perma.cc/EGX9-G6FW>; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 15, 2016, 11:29 AM), <https://perma.cc/XH7V-NHFY>; *see generally* Complaint and Demand for Jury Trial, *Zervos v. Trump*, Index No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017).

⁹⁷ *Zervos*, 59 Misc. 3d at 794.

⁹⁸ This is one of about 75 lawsuits pending against Trump right now. *See* Nick Penzenstadler, *Trump Claims Immunity From ‘Apprentice’ Contestant’s Lawsuit*, USA TODAY (Mar. 28, 2017, 1:03 PM), <https://perma.cc/LU4F-TXVF>.

⁹⁹ Complaint and Demand for Jury Trial, *Zervos v. Trump*, Index No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Memorandum of Law in Support of President Donald J. Trump’s Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. P. § 425.16(b)(1) or, in the Alternative, for a Stay Pursuant to CPLR 2201, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. July 7, 2017).

not exercise jurisdiction over the complaint at all, or at least during his presidency, because he is protected from suit under the doctrine of presidential immunity.¹⁰³ While a sitting president cannot be sued for civil damages in federal court unless those acts are “non-official,”¹⁰⁴ it is not clear that a president is immune from civil lawsuits over private interests in state court.

Trump then presented a First Amendment defense, arguing that the statements, “all of which were advanced during a heated political campaign to convince the public to vote for Mr. Trump, and many of which were published via Twitter—constitute non-actionable rhetoric and hyperbole that is protected by the First Amendment.”¹⁰⁵ Trump reasoned that since the “First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office,”¹⁰⁶ when “potentially defamatory statements are published in a public debate . . . in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole,” what would ordinarily “be considered as statements of fact may well assume the character of statements of opinion.”¹⁰⁷ The statements against Ms. Zervos, Trump argued, should be seen as part of the “longstanding public debate” Trump had engaged in “with the media and his opponents on a host of matters, including his qualifications to run for office.”¹⁰⁸ Trump even argued that the forums selected for the potentially defamatory statements—“the official campaign website, campaign rallies, a presidential debate, and President Trump’s Twitter account”—were all “forums the audience understands robust political debate will be conducted in, albeit in an informal manner.”¹⁰⁹ Trump then used a First Amendment defense

¹⁰³ “[T]he Supremacy Clause of the United States Constitution prevents this State Court from hearing this action, whatever its merit or lack thereof, against a sitting President.” *Id.* at 2. “[A] state court cannot exercise direct control or ‘retard, impede, burden, or in any manner control’ the Executive Branch by compelling the President to submit to its jurisdiction, including by ordering him to respond to motions or sit for discovery, or issuing a judgment against him.” *Id.* at 14 (internal citations omitted).

¹⁰⁴ Michael Rios, *Are Presidents Immune from Civil Lawsuits in State Court Over Their Private Conduct?*, PBS (Apr. 13, 2017, 12:18 PM), <https://perma.cc/Q2SZ-TYRH>.

¹⁰⁵ Memorandum of Law in Support of President Donald J. Trump’s Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. P. § 425.16(b)(1) or, in the Alternative, for a Stay Pursuant to CPLR 2201 at 23, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. July 7, 2017).

¹⁰⁶ *Burson v. Freeman*, 504 U.S. 191, 196 (1992).

¹⁰⁷ *Rudnick v. McMillan*, 31 Cal. Rptr. 2d 193, 197-98 (Cal. Ct. App. 1994).

¹⁰⁸ Memorandum of Law in Support of President Donald J. Trump’s Motion to Dismiss and Strike the Complaint Pursuant to CPLR 3211 and Cal. Code Civ. P. § 425.16(b)(1) or, in the Alternative, for a Stay Pursuant to CPLR 2201 at 25, *Zervos v. Trump*, No. 150522/2017 (N.Y. Sup. Ct. July 7, 2017).

¹⁰⁹ *Id.* at 27.

to bolster his argument that his statements about Zervos were either opinions, and thus non-actionable, or did not refer to Zervos specifically, and were thus non-actionable.¹¹⁰ In support of his arguments, Trump attached, among other documents, copies of Tweets and various news articles throughout the Presidential campaign.¹¹¹

On March 20, 2018, the court denied Trump's motion to dismiss on both the theory of presidential immunity and also declined to stay the litigation during the remainder of his presidency.¹¹² The court disposed of Trump's arguments that presidential immunity protected him from liability for defamation in state court, proclaiming "[n]o one is above the law" and that "[i]t is settled that the President of the United States has no immunity and is 'subject to the laws' for purely private acts," and that "there is absolutely no authority for dismissing or staying a civil action related purely to unofficial conduct because defendant is the President of the United States."¹¹³

The court briefly addressed the underlying defamation claim to conclude that the complaint could not be dismissed for failure to state a cause of action because Zervos's complaint was "based on assertions made" by Trump that, "if proven false, form the predicate for a maintainable defamation action."¹¹⁴ If and when the court reaches the merits of the case, it should analyze the case applying New York libel law, which has also adopted First Amendment constitutional principles. First, the court will determine whether Zervos is a limited purpose public figure to determine whether a negligence or actual malice standard of fault applies to Trump. The constitutional standard for determining when someone is a limited purpose public figure is whether they have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."¹¹⁵

There is a strong argument that Zervos did not "voluntarily inject" herself into the public controversy—the sexual assault claims against Trump—because she did not choose to be assaulted by Trump. She, furthermore, did not "maintain regular and continuing access to the media"

¹¹⁰ *Id.* at 29-33.

¹¹¹ *See generally id.*

¹¹² *Zervos v. Trump*, 59 Misc. 3d 790, 799-800 (N.Y. Sup. Ct. Mar. 20, 2018) (denying both motion to dismiss and stay of litigation); *see also* Complaint and Demand for Jury Trial, *Zervos v. Trump*, Index. No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017).

¹¹³ *Zervos*, 59 Misc. 3d at 795, 797 (quoting *Clinton v. Jones*, 520 U.S. 681, 696 (1997)).

¹¹⁴ *Id.* at 798.

¹¹⁵ *Gertz v. Robert Welch, Inc.*, 418 U.S. 324, 345 (1974); *see also* *Contemporary Mission, Inc. v. N.Y. Times Co.*, 842 F.2d 612, 617 (2d Cir. 1988).

simply because she filed a lawsuit—in fact, she made very few press appearances prior to or following the suit.¹¹⁶ The court could find otherwise, reasoning that she assumed a position of public prominence when she appeared on *The Apprentice*.

If Trump cannot prove that Zervos was a public figure, then the court will evaluate the case under a negligence standard, meaning because Zervos is considered a private citizen, she will have to prove five elements to succeed on a claim for libel: (1) a written defamatory statement; (2) unauthorized publication to a third party; (3) fault; (4) falsity of the defamatory statement; and (5) special harm to her reputation.¹¹⁷ In New York, “[w]hen statements fall within established categories of *per se* defamation, the law presumes that damages will result, and they need not be alleged or proven.”¹¹⁸ Zervos appears to allege facts sufficient for each of these elements. She indicates that Trump’s defamatory statements clearly identified her, that they were “defamatory *per se*,” and that they were published across the country, in part because Trump posted them to his Twitter account. Zervos also alleged that she suffered emotional harm and economic damage, “including reduced income at her restaurant.”¹¹⁹ Since, however, she only alleges that the statements were knowingly made and that they were “false” and he recklessly disregarded the truth, it is unclear if her claim would survive if it were analyzed under actual malice without more facts. The court, however, should not analyze the claim under an actual malice standard because Zervos is neither a general purpose or limited purpose public figure.

When it denied Trump’s motion to dismiss, the court also rejected Trump’s First Amendment defense that his statements were mere hyperbole, opinion, or part of public debate, reasoning that Trump’s repeated statements were “delivered in speeches, debates and through Twitter, [one

¹¹⁶ *Contemporary Mission, Inc.*, 842 F.2d at 612, 617; see also *Here’s What You Need to Know About Gloria Allred and Summer Zervos’s Lawsuit Against Donald Trump*, VOGUE (Jan. 17, 2017, 10:58 AM), <https://perma.cc/3UVW-LEPQ>.

¹¹⁷ *Mitre Sports Int’l. Ltd. v. Home Box Office, Inc.*, 22 F. Supp. 3d 240, 252 (S.D.N.Y. 2014) (citing *Celle v. Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 176 (2d Cir. 2000); see also *Accadia Site Contracting, Inc. v. Skurka*, 129 A.D.3d 1453, 1453 (4th Dep’t 2015) (quoting *D’Amico v. Corr. Med. Care, Inc.*, 120 A.D.3d 956, 957 (4th Dep’t 2014)); CHRISTINE M. G. DAVIS ET AL., 43A N.Y. JUR. 2D DEFAMATION & PRIVACY § 6, Westlaw (database updated May 2018).

¹¹⁸ “There are ‘four established exceptions [to the requirement that plaintiff allege special damages] consist[ing] of statements (i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a woman.’” *Zherka v. Amicone*, 634 F.3d 642, 645 n.6 (2d Cir. 2011) (quoting *Lieberman v. Gelstein*, 80 N.Y.2d 429 (1992)).

¹¹⁹ See generally Complaint and Demand for Jury Trial, *Zervos v. Trump*, Index No. 150522/2017 (N.Y. Sup. Ct. Jan. 17, 2017).

of Trump's] preferred means of communication," and the fact that they were made while he was campaigning for the presidency did "not make them any less actionable."¹²⁰ It is telling that Trump's assertion that his defamatory tweets were merely rhetoric and hyperbole dismissed the veracity of Zervos's claim: that Trump forcibly kissed and groped her without her consent, continued to pressure her to come to his hotel room, and then repeatedly kissed and forcibly touched her despite her protests, which amounts to sexual harassment and sexual assault in most jurisdictions.¹²¹ To assert the public debate defense in earnest, Trump had to allege that his repeated statements that Zervos was lying were only hyperbole and should not be taken seriously. This is another way of saying that Trump's defense here is that his statements, as president-elect, and maybe even as president, should not always be taken seriously.

So, should the court believe that when Trump called Zervos a "liar," he was only engaging in rhetoric, which means that Trump does not deny sexually assaulting Zervos? Or should the court believe that the sexual assault did not happen in order to reach the conclusion that Trump could not have defamed Zervos? Like the English court in *Lipsadt*, the court here will likely take the position that it is not in the business of evaluating whether or not the sexual assault happened (or in *Lipsadt* whether or not the Holocaust happened) to determine if Trump's tweets were defamatory. Even so, Trump's defense implies just that—that the sexual assault did not happen, so his comments about Zervos were just part of public debate.

Trump is defending himself in a defamation suit by saying that his fiery rhetoric is just part of public discourse, so he cannot be taken seriously, and is thus deserving of First Amendment protection. Yet, he has repeatedly alleged that the public ought to accept his administration's "alternative facts" as true and should reject the mainstream media's "fake news" as false. Ultimately, these contradictions call into question Trump's credibility, in general, and raise the question of what, if anything, that Trump says in public discourse can be taken as true, particularly if a court is required to analyze a defamation action where Trump is either the plaintiff or the defendant.

CONCLUSION

The Press should sue Trump for defamation when he alleges that mainstream news organizations report "fake news." While Donald Trump has called for looser First Amendment restrictions to American libel

¹²⁰ *Zervos v. Trump*, 59 Misc. 3d 790, 799 (N.Y. Sup. Ct. Mar. 20, 2018).

¹²¹ *Rudnick v. McMillan*, 31 Cal. Rptr. 2d 193, 197-98 (Cal. Ct. App. 1994).

law,¹²² which would make it easier for public figures, like him, to sue the press for defamation, First Amendment lawyers may consider another possibility: the press could sue Trump for defamation against the press based on his repeated attacks and unfounded allegations that many mainstream news entities are publishing “fake news.” Some have noted that Donald Trump “may be the greatest threat to the First Amendment since the passage of the Sedition Act of 1798.”¹²³

[It] seems to be that in light of the attacks made by then-Candidate Trump against the press on a continuing basis—his preventing certain journalists from even attending his rallies as part of the press corps because he disapproved [of] their writing, and his public comments about wanting to loosen American libel law—the press ought to be thinking broadly about how to defend itself if his Administration turns out to be as antagonistic to the press as may be the case We do have libel law It may well be necessary to think outside the box in response to a deliberately repressive Administration It’s because the level of hostility to the press, and perhaps the willingness to limit or punish press criticism may reach a new height in this Administration The press is used to defending libel cases . . . My plea is to bear in mind that one of the potential weapons is that when anyone—president or shoemaker—defames an entity, and speaks falsely and maliciously, one of the possible responses is to bring a libel suit.¹²⁴

Whether such a suit would be successful depends on the circumstances surrounding the defamatory speech alleged.

The denial of Trump’s motion to dismiss in *Zervos* is encouraging for the press and any advocate who wants to hold the president accountable. Ultimately, the press and advocates can and should consider the use of both defamation and First Amendment protections against defamation as tools in the resistance against Trumpism and the deprivations of civil

¹²² See Bixenspan, *supra* note 69; Frank Camp, *Trump Tells Supporters He Will ‘Open Up Libel Laws’ to Sue Press*, IJR (Feb. 27, 2016, 3:51 PM) <https://perma.cc/47MB-G6SP> (“One of the things I’m gonna [sic] do If I win — and I hope I do, and we’re certainly leading — is I’m gonna [sic] open up our libel laws, so when they write purposely negative and horrible and false articles, we can sue them, and win lots of money. We’re gonna [sic] open up those libel laws, so that when the New York Times writes a hit piece, which is a total disgrace . . . we can sue them, and win money, instead of having no chance of winning because they’re totally protected. You see, with me, they’re not protected, because I’m not like other people.”).

¹²³ Alberto Luperon, *Reporters Should Consider Suing Trump for Defamation, Top First Amendment Attorney Says*, LAW & CRIME (Nov. 11, 2016, 1:03 PM), <https://perma.cc/3P4P-YZFX> (statement of Floyd Abrams).

¹²⁴ *Id.* (statement of Floyd Abrams).

liberties that Trump has advocated that target Muslims, immigrants and non-citizens, people of color, members of Queer and Transgender communities, people with disabilities, and women. In this moment, amidst allegations of fake news and unsupported alternative facts by our nation's top official, the First Amendment and the anti-authoritarianism ideals it embodies are important as ever. The press and people should turn to the courts for assurance, that speech and dissent are appropriate mechanisms for holding the president accountable, and that such speech will be protected. At the same time, the press and citizens could also turn to the courts using the law of defamation to hold the president and other public officials accountable for spreading harmful rhetoric against women and other targeted groups, and for accusing the press of reporting "fake news." The First Amendment and defamation can both play an important role in the protection of free speech and the promotion of truth and accountability under Trump.